CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 7

H. L. MOSHER, PETITIONER,

vs.

CITY OF PHŒNIX

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 23, 1932

CERTIORARI GRANTED APRIL 11, 1932

(36,538)

(36,538)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 24, 1932

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

JOHN W. RAY, Phoenix National Bank Building, Phoenix, Arizona,
Attorney for Appellant.

CHARLES A. CARSON, Ellis Building, Phoenix, Arizona.

JAMES E. NELSON, Ellis Building, Phoenix, Arizona.

KIBBEY, BENNETT, GUST, SMITH and ROSENFELD, Phoenix National Bank Building, Phoenix, Arizona. [3*]

Attorneys for Appellee.

United States District Court, District of Arizona.

E.-214—PHX.

H. L. MOSHER,

Plaintiff,

vs.

CITY OF PHOENIX,

Defendant.

PETITION IN EQUITY FOR INJUNCTION.

Comes now the plaintiff H. L. Mosher, by John W. Ray, attorney, and complains of the defendant City of Phoenix and shows to the court, that the plaintiff is the owner in fee title and in the pos-

*Page-number appearing at the foot of page of original certified Transcript of Record.

session of the following parcel of land in the City of Phoenix, described as follows:

> Beginning at a point 66 feet north of the northwest corner of block 5 in the old town site of Phoenix, the corner of Second and Van Buren Streets, thence running north 714 feet to the corner of Second and Taylor Streets, thence west 50 feet to the true point of beginning of plaintiff's tract; thence running west 50 feet; thence *so* south 204 feet; thence east 50 feet; thence north 204 feet to the true point of beginning; said parcel of land being 204 feet in length and 50 feet in width, and lying just west of the line of Second Street in Phoenix, which said Second Street is of a width of fifty feet.

II.

That the City, defendant herein, is a municipal corporation duly organized and existing in Maricopa County and that *it* by its resolution number 5078 it has been enacted as a law of the City that Second Street between Van Buren and McDowell Streets be paved according to a plat and map theretofore made and approved by the City Commission, be paved and improved in accordance with a resolution of intention so to do numbered 5065 theretofore enacted; that by the plat and map approved, but which is not a part of the resolution save by reference thereto, the said Second Street is to be paved and [4] improved and sidewalks built therein and thereon, as a *widt* of one hundred feet and thereby by such resolution and the

approval of the map and plat and plan as pre*aper*ed and adopted, the City of Phoenix, by its constituted authority, has undertaken and is now proceeding by its authority and power to take and appropriate the property of this plaintiff as above described, that is, the strip of land 204 feet long by 50 feet wide, to be used as a public way in the City, and as a part of Second Street then to be one hundred feet wide and to improve and pave the same as a part of Second Street, 100 feet in width.

III.

Plaintiffs says that it has been adjudged and decided by the Superior Court of Maricopa County in an action wherein the City of Phoenix was a party that the resolutions and action of the City of Phoenix in the passage thereof were regular and valid and binding so far as it affects Second Street; that by the construction placed thereon by the city legislative and executive authority they have determined to include therein, as shown by the map and plan and plat approved and adopted, this property of the plaintiff, as within the property to be improved as a part of Second Street, and they have determined and are now proceeding to take, appropriate and improve the said property of plaintiff as above described for public purposes, that is, a street, without right, authority, ownership, or title thereto, either by dedication or in any other way, or by the exercise of the power of eminent domain, and without any process of law, save their own action in including same in the plan and plat and ordering *he* same improved

and taken, and in violation of the rights of the plaintiff as the owner thereof and in derogation of her rights under the Constitution of the United States, particularly the fourteenth amendment, that she is denied the equ*la* or any protection of the law; she is denied and her property [5] is being taken and appropriated without due process of law and is *is* being put to public use without any compensation therefor being made, paid or provided.

IV.

Plaintiff says that said parcel of land is worth, at a fair market value, a sum in excess of the sum of Ten Thousand Dollars; that if and when taken by the defendant she will be deprived of same and of such sum in excess of Ten Thousand Dollars in value; that she has no adequate, if any, remedy at law to prevent this taking of her property.

WHEREFORE, the premises considered, the plaintiff prays that there issue a writ of sub*l*oena compelling the defendant to answer and disclose by what, if any, right it claims to use and take and appropriate this above-described strip of land for s*y*reet purposes; that on hearing that the defendants be enjoined from taking such parcel of land for street or any other purpose, unless and until the same be taken by due process of law and with compensation to the plaintiff for any such lands taken; that she have such other and further relief as may be just and equitable, and for her costs and for all proper relief.

JOHN W. RAY,
For Plaintiff.

That plaintiff H. L. Mosher says that she is the plaintiff herein; that she has read the foregoing petition in equity; knows the contents thereof; that the statements therein contained are true and with her personal knowledge.

H. L. MOSHER.

Subscribed and sworn to before me by H. L. Mosher this Jan. 10th, 1931.

[Seal] ROBERT E. LEE SHEPHERD,
Notary Public.

My commission expires January 11th, 1932.

Filed Jan. 10, 1931. [6]

[Title of Court.]

SUBPOENA IN EQUITY.

The President of the United States of America to City of Phoenix, GREETING:

YOU ARE HEREBY COMMANDED that all excuses and delays set aside you be and appear within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the District of Arizona, at Phoenix, to answer unto the bill of complaint of H. L. Mosher in said court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

WITNESS the Honorable F. C. JACOBS, United States District Judge, at Phoenix, this tenth day of January, A. D. 1931.

[Seal] J. LEE BAKER,
Clerk.
By H. F. Schlittler,
Deputy Clerk.

MEMORANDUM.

The defendant in this case is required to file its answer or other defense in the Clerk's office of said court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the bill may be taken *pro confesso.* [7]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Arizona,—ss.

I hereby certify and return that I served the annexed subpoena in equity on the therein named City of Phoenix by handing to and leaving a true and correct copy thereof with George Todd, Manager of the City of Phoenix, personally, at Phoenix, in said District, on the 12th day of January, A. D. 1931.

G. A. MAUK,
U. S. Marshal.
By A. E. Frankforter,
Deputy.

Filed Jan. 12, 1931. [8]

[Title of Court and Cause.]

PRAECIPE FOR SUBPOENA IN EQUITY.

To the Clerk of Said Court:

Sir: Please issue subpoena in equity in this case.

JNO. W. RAY,
Attorney for Ptff. [9]

Issued Jan. 10, 1931.

Filed Jan. 13, 1931.

[Title of Court and Cause.]

MOTION TO DISMISS.

Comes now the City of Phoenix, a municipal corporation, the defendant in the above-entitled cause, and moves the court to dismiss plaintiff's petition in equity, filed herein, upon the grounds:

1. That said petition does not state facts sufficient to give this court jurisdiction.

2. That said petition in equity does not state facts sufficient to entitle the plaintiff to any relief in equity or otherwise.

Dated this 30th day of January, 1931.

CHAS. A. CARSON, Jr.,
JAMES E. NELSON,
KIBBEY, BENNETT, GUST, SMITH & ROSENFELD,
Attorneys for City of Phoenix.

Filed Jan. 30, 1931. [10]

October, 1930, Term—At Phoenix.

Minute Entry of Monday, February 9, 1931.

Honorable F. C. JACOBS, United States District Judge, Presiding.

[Title of Court and Cause.]

MINUTES OF COURT—FEBRUARY 9, 1931—ORDER SUBMITTING MOTION TO DISMISS BILL OF COMPLAINT.

Defendant's motion to dismiss the bill of complaint comes on regularly for hearing this day. John W. Ray, Esquire, appears as solicitor for the plaintiff, and Fred W. Rosenfeld, Esquire, appears as solicitor for the defendant. Upon stipulation of respective counsel,—

IT IS ORDERED that this case be submitted upon the briefs heretofore filed in case E.-189—Phoenix, H. L. Mosher, Plaintiff, vs. City of Phoenix, Defendant, and that said motion to dismiss the bill of complaint be taken under advisement. [11]

October, 1930, Term—At Phoenix.

Minute Entry of Thursday, April 2, 1931.

Honorable F. C. JACOBS, United States District Judge, Presiding.

[Title of Court and Cause.]

MINUTES OF COURT—APRIL 2, 1931—ORDER GRANTING MOTION TO DISMISS BILL OF COMPLAINT.

Defendant's motion to dismiss the bill of complaint having been heretofore argued, submitted, and by the Court taken under advisement, and the Court having duly considered the same and being fully advised in the premises,—

IT IS ORDERED that defendant's motion to dismiss the bill of complaint be granted, and that this case be, and the same is hereby, dismissed, to which ruling and order of the Court an exception is entered on behalf of the plaintiff. [12]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The plaintiff H. L. Mosher, feeling herself aggrieved by the judgment and decree of the court rendered April 2d, 1931, dismissing this cause for want of jurisdiction in this court on motion thereror duly made by the defendant, presents this her petition praying this court to allow an appeal

from such judgment and decree, and to fix such bond for costs of such appeal as may, in its judgment seem right and proper in the premises. Assignment of error are filed herewith.

JOHN W. RAY,
Attorney for Plaintiff.

Received copy this 7th day of April, 1931.
KIBBEY, BENNETT, GUST, SMITH & ROSENFELD,
F.,
Attorneys for Defendants.
Filed Apr. 7, 1931. [13]

[Title of Court and Cause.]

ASSIGNMENT OF ERROR.

The plaintiff herein, by John W. Ray, attorney, assigns as error the action of the trial court in its judgment and decree of dismissal, the following:

(1) The court erred in sustaining the motion to dismiss for want of jurisdiction.

(2) The court erred in holding and deciding that the petition herein did not present for determination any question arising under the Constitution or laws of the United States, or otherwise within the jurisdiction of the Federal courts.

(3) The court erred in holding and deciding that the action of the defendant city, by its legislative body, in ordering the improvement of the street named in the resolution did not undertake to deprive plaintiff of her property without due

process of law and without compensation made or provided.

Upon these assignments of error the plaintiff will rely for a reversal of the judgment and decree and will ask the Circuit Court of Appeals to render such judgment and decree in the premises as may seem just and right.

JOHN W. RAY,
Attorney for Plaintiff.

Received copy of the above assignment of error, April 7th, 1931.

KIBBEY, BENNETT, GUST, SMITH & ROSENFELD,
Attorneys for Defendants.

Filed Apr. 7, 1931. [14]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING COST BOND.

Upon consideration of plaintiff's petition for allowance of an appeal herein, IT IS ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit from the decree filed and entered herein be and the same is hereby allowed and that a certified transcript of the record and all proceedings be forthwith transmitted to the said Circuit Court of Appeals at San Francisco.

AND IT IS FURTHER ORDERED that cost bond on appeal be fixed at the sum of Two Hun-

dred Fifty ($250.00) Dollars, and that the same may be approved by the Clerk of this court.

Dated this April 8th, 1931.

F. C. JACOBS,
Judge U. S. Dist. Court.

Received copy this 7th day of April, 1931.

KIBBEY, BENNETT, GUST, SMITH & ROSENFELD,
F.,
Attorneys for Defendants.

Filed Apr. 8, 1931. [15]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, H. L. Mosher, as principal, and John R. Scaife and Paul J. Benson, sureties, all of the City of Phoenix, are held and firmly bound unto the above-named City of Phoenix in the sum of Two Hundred Fifty Dollars, to be paid the said City of Phoenix, for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors, administrators jointly and severally by these presents.

Sealed and signed this day of April, 1931.

Whereas the above-named H. L. Mosher has prosecuted an appeal to the United *Stat* Circuit Court of Appeals, Ninth Circuit, to reverse the judgment and decree rendered in the above-entitled suit by

the District Court of the United States for the district of Arizona,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named H. L. Mosher shall prosecute said appeal to effect and answer such damages and costs, if he fail to make said appeal good, then this obligation shall be null and void, otherwise the same to be and remain in full force and effect.

H. L. MOSHER.
J. R. SCAIFE.
P. J. BENSON.

Sealed and delivered and taken and acknowledged this 30th day of April, 1931, before me.

———————.

Approved as to sureties, April ——, 1931.

———————. [16]

[Title of Court.]

AFFIDAVITS OF JOHN R. SCAIFE AND PAUL J. BENSON.

State of Arizona,
Maricopa County.

The affi*davts* John R. Scaife and Paul J. Benson, each for himself and one for the other, upon their oaths say: That they and each of them are worth, over and above their exemptions and liens thereon, real estate in the State of Arizona, the sum of two hundred and fifty dollars and more, the penal sum in the bond signed by them as sureties

for H. L. Mosher to prosecute an appeal to the United States Circuit Court of Appeals, Ninth Circuit, from that certain judgment and decree rendered herein.

JOHN R. SCAIFE.
P. J. BENSON.

Subscribed and sworn to before me by J. R. Scaife and Paul J. Benson, each for himself, this April 30, 1931.

[Seal] RACHAEL ROBINSON.
My com. expires: 1/27/34.

Filed May 1, 1931. [17]

[Title of Court and Cause.]

ORDER FOR RECORD ON APPEAL.

The Clerk of the District Court will copy and certify to the Circuit Court of Appeals on the appeal herein the entire record, except the summons, and any memorandum of authorities or briefs filed.

JOHN W. RAY,
For Plaintiff.

Filed May 1, 1931. [18]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING JUNE 10, 1931, TO FILE RECORD AND DOCKET CAUSE ON APPEAL.

It appearing to the court that the Clerk of this

court will be unable to prepare the record in this case and return and file the same with the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, on May 7th, 1931, that being the return day fixed in the citation heretofore issued,—

NOW, THEREFORE, for good cause shown, IT IS HEREBY ORDERED that the time to file the record in this case and to docket the same with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit and the return day of the citation, be and the same is, hereby enlarged and extended to and including the tenth day of June, 1931.

Done in open court May 7th, 1931.

F. C. JACOBS,
Judge U. S. Dist. Court.

Filed May 7, 1931. [19]

[Title of Court.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona,—ss.

I, J. Lee Baker, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said court, including the records, papers and files in the case of H. L. Mosher, Plaintiff, *versus* City of Phoenix, Defendant, numbered E.-214—Phoenix, on the docket of said court.

I further certify that the attached pages, numbered 1 to 20, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record, amounts to the sum of $4.15 and that said sum has been paid to me by counsel for the appellant.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the seal of the said court this 12th day of May, 1931.

[Seal] J. LEE BAKER,
Clerk. [20]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America—To City of Phoenix, a Municipal Corporation, Defendant, GREETING:

You are hereby cited and admonished to be and appear at the Circuit Court of Appeals of the United States, to be holden in the city of San Francisco, California, on the seventh day of May, 1931,

pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Arizona, in Phoenix, Arizona, wherein H. L. Mosher is appellant and City of Phoenix, a municipal corporation, is respondent, to show cause, if any there be, why the judgment of dismissal in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

WITNESS, the Hon. FRED C. JACOBS, Judge of the United States District Court, this April 7th, 1931.

[Seal] F. C. JACOBS,
Judge United States District Court. [21]

Filed Apr. 8, 1931. [22]

[Endorsed]: No. 6472. United States Circuit Court of Appeals for the Ninth Circuit. H. L. Mosher, Appellant, vs. City of Phoenix, a Municipal Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed May 20, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6472

United States

Circuit Court of Appeals

For the Ninth Circuit.

H. L. MOSHER,

Appellant,

vs.

CITY OF PHOENIX, a Municipal Corporation,

Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday, the thirtieth day of October, in the year of our Lord one thousand nine hundred and thirty-one. Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable WILLIAM P. JAMES, District Judge.

[Title of Cause.]

ORDER GRANTING APPLICATION FOR LEAVE TO FILE NEW BOND AND SUBMITTING CAUSE.

ORDERED motion of appellee to dismiss appeal in above cause argued by Mr. John L. Gust, counsel for the appellee and in support of said motion, and by Mr. John W. Ray, counsel for the appellant, and in opposition to said motion,—

Upon consideration thereof, and of the application of appellants, this day filed, for approval of the bond in above cause, or for an order permitting the District Court to approve such bond, or for leave to file a new bond in above cause, IT IS ORDERED that the said motion to dismiss be, and hereby is denied, and that the application of appellant be, and hereby is granted,

and that Mr. John W. Ray, counsel for appellant, be, and hereby is granted leave to file new bond in above cause in the sum of Two Hundred and Fifty Dollars ($250.00) said bond to be approved by the District Judge of the District of Arizona and filed with the Clerk of the said District Court of Arizona within ten days from date, and a certified copy of said bond to be sent to the Clerk of this court.

FURTHER ORDERED cause on merits argued by Mr. John W. Ray, counsel for appellant, and by Mr. John L. Gust, counsel for appellee, and submitted to the Court for consideration and decision.

United States District Court, District of Arizona.

No. E.-214—PHX..

H. L. MOSHER,

Plaintiff,

vs.

CITY OF PHOENIX, a Municipal Corporation,

Defendant.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, H. L. Mosher, as principal, and John R. Scaife and M. M. Toncray, as sureties, all of the city of Phœnix, are held and firmly bound unto the above-named City of Phoenix, in the sum of Two Hundred and Fifty Dollars, for payment of which to said City of Phoenix well and truly to be

made we bind ourselves, and each of us, our heirs, executors and administrators jointly and severally by these presents.

Signed and sealed this 5th day of November, 1931.

WHEREAS the above-named H. L. Mosher has prosecuted an appeal to the United States Circuit Court of Appeals, Ninth Circuit, to reverse the judgment and decree rendered in the above-entitled suit by the District Court of the United States, District of Arizona,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named H. L. Mosher shall prosecute said appeal to effect and answer such damages and costs as may be adjudged, if she fail to make said appeal good, then this obligation shall be null and void; otherwise the same to be and remain in full force and effect.

H. L. MOSHER.
M. M. TONCRAY.
JOHN R. SCAIFE.

United States of America,
District of Arizona,—ss.

This instrument was acknowledged before me this 5th day of November, 1931, by H. L. Mosher, as principal, and M. M. Toncray and John R. Scaife, as sureties.

[Seal of the U. S. District Court]

J. LEE BAKER.
J. LEE BAKER,
Clerk United States District Court for the District of Arizona.

United States of America,
District of Arizona,—ss.

The affiants, John R. Scaife and M. M. Toncray, upon their several oaths, each for himself and not one for the other say: That he is worth in real estate situate in the State of Arizona, over and above all his debts and exemptions, the sum of more than Two Hundred and Fifty Dollars, that being the amount of the above bond which they sign as surety of H. L. Mosher, principal, on appeal to the United States Circuit Court of Appeals, Ninth Circuit, from a judgment and decree in favor of the city of Phoenix.

JOHN R. SCAIFE.
M. M. TONCRAY.

Subscribed to and sworn to before me by John R. Scaife and M. M. Toncray, each for himself, this 5th day of November, 1931.
[Seal of the U. S. District Court]

J. LEE BAKER.
J. LEE BAKER,
Clerk, United States District Court, for the District of Arizona.

Approved: November 5, 1931.

F. C. JACOBS,
Judge, United States District Court, for the District of Arizona.

Filed Nov. 5, 1931. J. Lee Baker, Clerk, United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk.

The United States District Court for the District of Arizona.

United States of America,
District of Arizona,—ss.

I, J. Lee Baker, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect, and complete copy of Bond on Appeal in E.-214—Phx., H. L. Mosher, Plaintiff, vs. City of Phoenix, a Municipal Corporation, Defendant, filed November 5, 1931, in the United States District Court, for the District of Arizona, as the same appears from the original record remaining in my office.

WITNESS my hand and the seal of said court this 5th day of November, 1931.

[Seal] J. LEE BAKER,
Clerk.
By Gladys West Smith.
Gladys West Smith,
Deputy.

[Endorsed]: Filed Nov. 7, 1931. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on

Monday, the fourteenth day of December, in the year of our Lord one thousand nine hundred and thirty-one. Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable WILLIAM P. JAMES, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the Clerk and that a decree be filed in above cause and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the District of Arizona.

Before WILBUR and SAWTELLE, Circuit Judges, and JAMES, District Judge.

WILBUR, Circuit Judge.—Appellant filed her bill in equity claiming that she owned a strip of land 50 feet wide and 204 feet in length within the limits of Second Street between Van Buren and

McDowell Streets, as defined by the city authorities in the City of Phoenix, Arizona; that the city commissioners, by resolution of intention No. 5065 and by resolution No. 5078, ordering the improvement of Second Street between Van Buren and McDowell Streets, are proposing to improve Second Street to a width of 100 feet, which includes the 50 foot strip plaintiff owns.

We have held in the companion case of Mosher vs. City of Phoenix, No. 6471, that a controversy as to the ownership of private land within the limits of the street, or alleged street, does not raise a federal question merely because the city authorities are proposing to improve the same under the state law, which as we have held in Collins vs. City of Phoenix, No. 6470, does not authorize the improvement of private property. The decisions in Collins vs. Phoenix, No. 6470, and Mosher vs. Phoenix, No. 6471, require the affirmance of the decree of dismissal entered in the lower court, unless the allegations of the appellant's complaint show additional facts requiring the interposition of the court.

Plaintiff alleges in her bill:

> "That it has been adjudged and decided by the Superior Court of Maricopa County in an action where the city of Phoenix was a party that the resolutions and action of the City of Phoenix in the passage thereof were regular and valid and binding so far as it affects Second Street; that by the construction placed thereon by the city legislative and executive authority they have determined to include

therein, as shown by the map and plan and plat approved and adopted, this property of the plaintiff, as within the property to be improved as a part of Second Street * * * ."

This allegation adds nothing to the complaint; it does not appear that the plaintiff is a party to the action in the Superior Court or that the question sought to be raised here was raised in that action, and if she was a party to the action and the question was raised as to the ownership of the portion of Second Street she now claims to own, the decision in that court would be binding upon her. For the reasons state in Mosher vs. Phoenix, No. 6471, no federal question is involved herein.

Decree affirmed.

[Endorsed]: Opinion. Filed Dec. 14, 1931. Paul P. O'Brien, Clerk.

Referred to in opinion in Mosher vs. City of Phoenix, No. 6472.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6470.

J. D. COLLINS,

Appellant,

vs.

CITY OF PHOENIX, a Municipal Corporation, and SCHMIDT-HITCHCOCK CONTRACTORS, a Corporation,

Appellees.

Appeal from the District Court of the United States for the District of Arizona.

Before WILBUR and SAWTELLE, Circuit Judges and JAMES, District Judge.

WILBUR, Circuit Judge.—This is an appeal from judgment of dismissal given upon a motion to dismiss the complaint for lack of sufficient facts to justify the relief prayed for. The appellant predicating jurisdiction upon a diversity of citizenship brought this action in equity in the United States District Court for Arizona to enjoin the further improvement of First Street between Van Buren and McDonald Road in the city of Phoenix, under proceedings thereto instituted by the city authorities of Phoenix by resolution No. 5065, and to enjoin the contractor to whom the performance of the street work therein specified had been let from proceeding with the work. Appellant claims that the proceedings are void for certain defects enumerated in the bill. The court had previously denied a motion for an interlocutory injunction and from this order an appeal was taken to this court, and decided in Collins vs. City of Phoenix, 26 F. (2d) 753, 754. Appellant also petitioned the Supreme Court for a writ of mandamus to compel the calling in of two additional judges to sit with the District Judge in this case. This application was denied. Ex parte Collins, 277 U. S. 565.

The general nature of the proceedings for improving the streets under the law of the state of Arizona, effective in the city of Phoenix, is briefly

stated in our previous opinion (Collins vs. City of Phoenix, *supra*). We will endeavor to dispose of the numerous points urged by the appellant as briefly as may be.

Appellant is the owner of a block of land fronting upon the proposed improvement. The proceedings were initiated by resolution No. 5065 enacted in pursuance of the provisions of Revised Statutes of Arizona T. 7, ch. 12, and the Bond Act, Arizona Statutes 1919, ch. 144. The first contention is that these legislative acts of Arizona do not apply to the city of Phoenix. The charter of the city of Phoenix provides that the legislative body thereof can adopt the laws of the state of Arizona in force at the time of the improvement and that when it does so the state statute is in force in Phoenix (charter of Phoenix, ch. 4, § 2, sub. 45), and it is conceded by the appellant that by appropriate action the city could adopt and apply this state law. It is contended, however, that it has not done so. The charter provision referred to is in part as follows:

> "Whenever in the judgment of the commission, or of the people, the cost and expense of any of the foregoing improvements is to be paid by special assessment on private property, the laws of the state of Arizona in force at the time of the improvement shall govern and control, and all proceedings shall be in conformity therewith * * * ."

Appellant says:

> "By resolution 5065, it is declared that the

> city intends to enact certain legislation concerning street improvement on First Street. * * * It is, what it pretends to be, a notice of intention to enact legislation. A notice that we will enact legislation adopting certain procedure contained in the Civil Code."

The point seems to be that this resolution of intention cannot be deemed to be a judgment or determination of the commission that the expense of the improvements should be paid by special assessment because objections might be made to the improvements, the protest might be sustained, the extent of the district might be altered, etc.

The next point is diametrically opposed to that just discussed, for it is claimed that the resolution of the improvements should be paid by special assesslution of intention. It is stated:

> "An examination of resolution No. 5065, the so-called resolution of intention, discloses that it creates an assessment district and orders the work done and nowhere provides for a time or place when objections may be made or protests filed. It is true that the title of the resolution recites, 'A resolution of the Commission of the City of Phoenix declaring its intention to improve certain portions of First street, etc.' "

Section 2 of the ordinance is then quoted to the general effect that it is the opinion of the commission that the contemplated work is of more than local or ordinary public benefit, and that the said commission "hereby makes the costs and expenses

of said work of improvement chargeable upon a district and hereby declares that the district in said city of Phoenix benefited by the said work or improvement, and to be assessed to pay the costs and expenses thereof, in proportion to the benefits", etc., is as thereinafter described.

Appellant states:

> "This is not a resolution of intention to do. It is a declaration by the legislative body that we have acted on this legislation and direct the improvement to be made."

It is clear, we think, that the resolution of intention is a sufficient declaration of the judgment of the commission within the meaning of the charter to make effective the state law within the city of Phoenix as it relates to this improvement. As to the contention that such a conclusion converts the so-called resolution of intention from a resolution of intention into an ordinance ordering the work to be done, we think it sufficient to say that the resolution of intention is characterized as a resolution of the Commission "declaring its intention to improve certain portions of First Street in the City of Phoenix, and determining that improvement bonds shall issue to represent the costs and expenses thereof." Section 1 of the act declares it the intention of the Commission of the city of Phoenix to order the work to be done. Section 2 provides that the assessment shall be chargeable on a district therein described. Section 3 provides for the issuance of bonds therefor under the state statutes which are therein referred to. Section 4 provides

for the posting of notices of the proposed improvement and that the city clerk shall certify to the passing of a resolution of intention and cause it to be published, etc. These are the usual provisions of a resolution of intention.

Appellant cites Cooper vs. City of Bozeman, 169 Pac. 801, by the Supreme Court of Montana; Shapard vs. Missoula, 141 Pac. 544, and Hinzeman vs. City of Deer Lodge, 193 Pac. 396, as supporting the proposition that this is not a resolution of intention, but they do not do so.

We are not certain that we have apprehended appellant's point for the reason that the discussion takes rather a broad range. We have taken the view that the appellee takes of this proposition, namely, that it is contended that the Commissioners of Phoenix did not act in such fashion as to adopt the state law as the basis for its assessment of the costs of the improvement. As we have pointed out the resolution of intention expressly refers to the statutory law and determines the cost of the improvement should be assessed upon the property benefited. This under the provisions of the charter hereinabove quoted is a sufficient adoption of the statutory method of procedure.

The next specification of appellant's brief is entitled "Objection B." The point herein made is that § 525 of the Civil Code of Arizona adopted in 1928 which provides that the superintendent of streets shall assess the entire cost of work, including incidental expenses against the lots in the assessment district, is in violation of the constitution

of Arizona, Art. 9, sec. 6, which authorizes the state legislature to give power to incorporated cities, towns and villages "to make local assessments, or by special taxation of property benefited." The point is that a law which requires the total cost of the improvements to be assessed in a district to be benefited violates the constitution which confines the amount of the assessment to the amount of the benefits. The argument is that the total benefits may not be as great as the total cost. To further illustrate the nature of the point made by the appellant, we cite the cases to which he calls our attention: Greely vs. People, 60 Ill. 19; Chicago vs. Adcock, 168 Ill. 221, 48 N. E. 155; Dexter vs. Boston, 176 Mass. 247; 57 N. E. 379; White vs. Gove, 183 Mass. 333; 67 N. E. 359; Detroit vs. Chopin, 112 Mich. 588, 71 N. W. 149; Adams vs. Shelbyville, 154 Ind. 467; 57 N. E. 114; Walsh vs. Barron, 55 N. E. 164; 61 Ohio St. 15; Kettle vs. Dallas, 35 Tex. Civ. Ap. 632; 80 S. W. 874; Smith vs. Omaha, 49 Neb. 883; 69 N. W. 402; Norwood vs. Baker, 172 U. S. 269. This question has been so often considered by the courts that it does not merit consideration in a case where the area of the district is determined by the proper legislative body after an opportunity to object to the inclusion or exclusion of territory benefited. Without discussion or further citation we call attention to the numerous cases cited to the notes on Norwood vs. Baker, 172 U. S. 269, in Rose's notes, Vol. 18, pp. 102, 112, and supplement to Rose's notes, Vol. 3, pp. 1007, 1008, 1009. See discussion of the general subject

in my dissent in City of San Diego vs. A. T. & S. F., 45 F. (2d) 11, 13, 16, and decision of this court in Northwestern Pac. R. R. vs. Town of Larkspur, 36 F. (2d) 554, 556.

The next objection specified by the appellant is that the incidental expenses of doing the work are to be added to the assessment therefor in the first instance by the Superintendent of Streets. It is claimed that the Superintendent of Streets is not qualified to pass upon his own accounts in making the assessments. This is the almost universal method of making such assessments, and the right of appeal to the local legislative body from the assessment of the Superintendent of Streets is the remedy for the correction of any error in that regard.

The next specification of error is that the city of Phoenix has exceeded its limit of indebtedness and that without a vote of the people an expense is created in the form of incidentals that cannot properly be incurred by the city. The appellant does not allege that there is not money amply sufficient to pay these expenses from the treasury from the current revenue. This is not an incurred indebtedness, within the meaning of the constitutional provision cited by the appellant. (Citing 6 McQuillin Mun. Corp., § 734, p. 28, 2d ed., p. 34, § 2378.) See also San Francisco Sulphur Co. vs. Contra Costa Co., 207 Cal. 1.

The next objection is that the resolution ordering work, No. 5078, was not published at all. It is conceded that the statute does not require it to be published. It expressly so states:

> "No publication or notice other than that provided for in this chapter shall be necessary to give validity to any of the proceedings provided for therein."

Appellant contends notwithstanding this express provision of the statute that the charter provision requiring publication of resolutions and ordinances must be construed with that statute and that taken together the ordinance must be published as required by the charter. The case of Barber Asphalt Co. vs. Costa, 171 Cal. 138, is cited in support of this proposition. Also Los Angeles vs. Central Trust Co., 173 Cal. 323; Loop Lbr. Co. vs. Van Loben Sels, 173 Cal. 228; Storke vs. Santa Barbara, 244 Pac. 158.

The charter dealt with in the case of the city of San Jose, California, cited by appellant (Barber Asphalt Co. vs. Costa, 171 Cal. 138), depends upon an entirely different situation. There the charter was made supreme over the state law. There the general law was adopted only "where not inconsistent with the express provisions of the charter." (See Ransome-Crummey Co. vs. S. F. Bennett, 177 Cal. 560, dealing with the same charter.) See also Smith vs. Lightston, 186 Pac. 769.

The Supreme Court of Arizona in the case of Amish vs. Phoenix, 36 Ariz. 21, 282 Pac. 42, seems to settle this question in principle so far as the city of Phoenix is concerned. It was therein held that the provisions of the charter, contrary to the state law, do not control with reference to the execution of contracts for the paving of streets by

special assessment under provisions of the state law adopted by the Commissioners of the City of Phoenix for the purposes of such improvement. It is there said:

> "A provision of this nature is valid as an adoption of the state law for the purpose intended. Buntman vs. City of Phoenix, 32 Ariz. 18, 255 Pac. 490. Since the contract was executed as provided by the statute, the third assignment is without merit."

The next specification of error is that inasmuch as the street improvement proceedings involve the issuance of bonds or special assessments, the constitution for the state of Arizona, Art. 7, § 13, provides that the matter must be submitted to the taxpayers. This matter has been decided by the Supreme Court of the state of Arizona, adversely to the appellant's contention. Ainsworth vs. Paving Co., 18 Ariz. 243.

Specification, objection I, of appellant's brief, is predicated on the theory that the size of the assessment district and the inclusion therein of property fronting upon the street, but not upon the paved portions thereof, was for the fraudulent purpose of preventing the plaintiff from exercising the statutory power of protest, which in the event that 50 per cent of the frontage affected objected to the improvement would deprive the Commission of jurisdiction to proceed with the improvement. It should be noted in the first place that this position is entirely inconsistent with objection B. That is to say, in objection B, *supra,* it is contended that

the city Commission had no power to make the total assessment chargeable upon the property in the district. This, of course, is based upon the claim that all of the property benefited is not included in the district, consequently, it is claimed the total cost of the improvement is to be imposed upon less property than is actually benefited. The claim here is that the inclusion of other property fronting along the street was improper because of the fraudulent intent on the part of the said Commission to forestall an effective veto by the property owners in that by including more property in the district than actually fronted on the improvement they deprived the property holders fronting on the pavement of the veto power which they could otherwise have exercised in the event the entire cost had been placed upon their property by excluding the other property from the assessment district. Of course this inconsistency of the appellant's position does not solve the problem presented by the objections. The first objection (I) we have already disposed of as untenable. It is certainly a novel proposition for a property holder to object to the inclusion within the taxable district of property which is thereby required to bear a part of the burden which would otherwise fall upon him. The law is that the size of the assessment district is to be determined by the legislative body under the laws of Arizona subject to the right of the property holders to be heard as to the size of the district, and to a readjustment of the boundary lines of the assessment district after the hearing of the property holders interested therein. As this point has been

so often and so thoroughly settled, we content ourselves with citation of the statutes of Arizona and the decisions of that state and others upon the subject; Pars. 1927, 1954, 1955, 1960, Rev. Stat. 1913, Civil Code of Arizona; Bates vs. Twist, 70 Pac. 1023; Roberts vs. Phoenix, 25 Ariz. 466, 471; Phoenix vs. Southwest Flour & Feed Co., 31 Ariz. 219; 250 Pac. 1060.

The real point to appellant's objection is that by increasing the size of the district more frontage was introduced within the district, and the property holders more vitally interested by reason of the fact that the improvement was in front of their property were thereby prevented from effectively protesting against the entire improvement. It is claimed that this plan was concocted with the fraudulent view of preventing this protest and that it is the intention of the Superintendent of Streets, when the time comes to make the assessment, to place a nominal assessment against all the lots other than the property of appellant and other fronting upon the major portion of the improvement. With reference to this proposition it should be said that while the appellant did protest against the improvement, and his protests were overruled, he did not protest or file objections to the size of the district. The remedy for any injustice in regard to the size of the district was in the first instance at least, by an application to the City Commission for change of the boundaries thereof. This was not done, and for that reason such objection may not now be made the basis of an action of the court in equity. The

appellant has not pursued his legal remedies and is therefore in no position to invoke the powers of a court of equity to secure the relief which he might have secured by appropriate appeal to the Commission. Neither the allegation that the Commission had acted fraudulently, nor the claim that they intend to carry out the fraud, justify the interposition of the court of equity at this time. The allegation that the Superintendent of Streets intends to violate the law in the making of an assessment for an improvement which appellant seeks to prevent is, to say the least, premature, particularly in view of his right of appeal from such assessment. Appellant cannot invoke the powers of a court of equity until he has exhausted his legal remedies in an effort to secure a fair assessment, and these legal remedies include those provided by the law for the improvement of streets here in question. San Francisco Sulphur Co. vs. Contra Costa Co., 207 Cal. 1, 7; Teeter vs. City of Los Angeles, 290 Pac. 11; Oak Hill vs. Gillett, 13 Cal. App. 605; Ainsworth vs. Paving Co., 18 Ariz. 243, 158 Pac. 428; City of Globe vs. Willis, 16 Ariz. 378; 146 Pac. 544; and by this court on the former appeal in this case, Collins vs. City of Phoenix, 27 Fed. 753, 754, *supra.* The point is without merit.

The next objection, specification G, is that the proceedings are violative of Sec. VIII of Art. IX of the constitution of Arizona, which requires that every law which imposes a tax shall state the tax and the object for which it shall be applied, "and it shall not be sufficient to refer to any other law

to fix such tax or object." It is sufficient to say that the ordinance ordering work in this case does not impose a tax within the meaning of the constitution of Arizona referred to, nor is the assessment proposed such a tax. We think it is unnecessary to cite any authority upon this subject as the point is too well established in this type of proceeding to merit discussion. We refer, however, to 5 McQuillin Mun. Corp., § 2165, p. 570. The case cited by the appellant in support of his contention, Trobridge vs. City of Detroit, 68 N. W. 402, is not applicable to proceedings of municipal corporations for improvement of streets.

The specification, objection H in appellant's brief, is of a more serious character. Appellant alleges that a portion of the street ordered improved by the legislative authority of the city of Phoenix is not and never was a public street, "that it is a private easement and right of way created by deed of record." One claim of appellant is that the taking of a private easement to improve it as a street would be a taking of property without due process of law, but he is not in a position to make that complaint, as he does not claim to own the property alleged to be so taken. The real question involved is whether or not the city can assess the costs of improving private property upon the appellant's property. As appellant states it:

> "The city does propose to take plaintiff's property, his assessment, to pay the costs and expenses of improving the private property of another."

The answer of the appellee to this contention is two-fold. It is first claimed that under Revised Code of 1928, § 550, the city Commissioners were authorized to improve any street "now open," and that although the street is a private easement it can be so improved as a street as it is clear from the allegations of the complaint that this street is "now open." The statute, (§ 500, Rev. Code of Arizona 1928) referred to, defines a "street" as follows:

> "Avenues, alleys, highways, lanes, crossings, intersections, courts, places and grounds now open or dedicated, or hereafter opened or dedicated to public use."

The law in force at the time these proceedings were instituted on that subject was paragraph 1953, R. S. of Arizona, 1913:

> "All streets, lanes, places, alleys, courts, avenues, boulevards, highways, crossings, intersections and public ways in the municipalities of this state, now open or dedicated, or which hereafter may be opened or dedicated to public use, shall be deemed to be held open public streets," etc.

Appellees cite no decision of the Supreme Court of Arizona construing this statute. While we are, therefor, loath to attempt a construction of the statute we think it is clear that this statute would not justify the legislative authority of the city in improving property which, although for some reason, open or used for public street, did not belong to the public. Such a private way would not be a "public street"

within the meaning of the statute. The opening of a street is usually held to be an offer to dedicate it to the public. In order to complete the dedication and constitute the open street a public street there must be an acceptance of the proposed dedication. This may usually be implied from mere user thereof by the public. If a street were open with the knowledge and consent of the owner and after such opening the authorities of the city enacted ordinances for its improvement, their enactment would, we think, constitute an acceptance of the dedication and *ipso facto* constitute the street a public street. See San Francisco S. Co. vs. Contra Costa Co., 207 Cal. 1, 6, *supra.* The Arizona statute above quoted (Par. 1953, R. S. Ariz. 1913) is taken bodily from the Vrooman Act of California (Stats. Cal. 1885, p. 147, § 1).

The attempt to improve private property under the Vrooman Act of California has been uniformly held unlawful under the Street law of California. Assessments to pay for such improvements are void. (Spaulding vs. Bradley, 79 Cal. 449; Spaulding vs. Wesson, 115 Cal. 441; Bou vs. Willits, 61 Cal. App. 32). The legislature of California has attempted to meet the situation arising from many defective dedications and acceptances of streets by providing that if title is made to the street before a judicial determination of the invalidity of the assessment the assessment is not invalidated by the delay in the acquisition of the title to the street. (See decision of the California Supreme Court in Rice vs. Town of Los Gatos, Oct. 31, 1930, 80 Cal. Dec. 519.)

The authorization of the legislature of Arizona to improve all streets "now open" would no doubt operate as an acceptance by the public of any such streets theretofore opened for public use, but in the teeth of the allegation that First Street in Phoenix is a private right of way and not a public street, it cannot be assumed that the street is a public street even if it is "now open." We may suspect that there has been a dedication and an acceptance of the street, but the ultimate fact is ownership, and that is expressly alleged to be private and not public.

It has been held in other jurisdictions that the expense of improving private property cannot be assessed upon other private property. Leavenworth vs. Laing, 6 Kan. 274; Culver vs. Yonkers, 80 N. Y. S. 1034; Spier vs. New Utrecht, 121 N. Y. 420; Lorenz vs. Armstrong, 3 Mo. App. 574; In re Rhinelander, 68 N. Y. 105; Reiff vs. City of Portland, 71 Or. 421; Smith vs. Smythe, 197 N. Y. 457. For this reason the court erred in sustaining the motion to dismiss the complaint.

Decree reversed.

[Endorsed]: Opinion. Filed Dec. 14, 1931. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6472.

H. L. MOSHER,

Appellant,

vs.

CITY OF PHOENIX, a Municipal Corporation,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the District of Arizona.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Arizona, and was duly submitted.

On consideration whereof, it is now here ORDERED, ADJUDGED AND DECREED by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this court, that the appellee recover against the appellant for its costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered Dec. 14, 1931. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. John W. Ray, counsel for the appellant, and good cause therefore appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this court in the above cause be, and hereby is stayed to and including February 15, 1932; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California, January 12, 1932.

[Endorsed]: Filed Jan. 12, 1932. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-six (46) pages, numbered from and including 1 to and including 46, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 8th day of February, A. D. 1932.

[Seal] PAUL P. O'BRIEN,
Clerk.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATES—Filed Feb. 5, 1932

Upon application of Mr. John W. Ray, counsel for the appellant in each of above causes, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this Court in each of the above causes be, and hereby is stayed to and including February 23, 1932; and in the event the petition for a writ of certiorari to be made by the appellant in each of above causes be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandates of this Court are to be stayed until after the said Supreme Court passes upon the said petition.

Curtis D. Wilbur, United States Circuit Judge.

Dated San Francisco, California, February 5, 1932.

[File endorsement omitted.]

A true copy. Attest Feb. 5, 1932:
Paul P. O'Brien, Clerk. (Seal United States Circuit Court of Appeals, Ninth Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 11, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, limited to the question of the jurisdiction of the District Court as a Federal court.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. [redacted] 6

Supreme Court

OF THE

United States

OCTOBER TERM, 1931

H. L. MOSHER,

Petitioner,

vs.

CITY OF PHOENIX, ARIZONA,
a Municipal Corporation,

Respondent.

JOHN W. RAY,
For Petitioner

Supreme Court

OF THE

United States

OCTOBER TERM, 1931

H. L. MOSHER,

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CITY OF PHOENIX, ARIZONA,
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Home Tel. Co. vs. City of Los Angeles, 227 U. S. 278.

Kentucky Power & Light Co. vs. Maysville, 36 Fed. (2) 816.

Standard Computing Scale Co. vs. Farrell, 249 U. S. 577.

St. Paul Gas & Light Co. vs. St. Paul, 181 U. S. 142. Distinguished.

Memphis vs. Cumberland Tel. Co., 218 U. S. 642.

Petition for CERTIORARI to United States Circuit Court of Appeals, Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, H. L. Mosher, by attorney John W. Ray, respectfully presents this, her petition for a Writ of Certiorari to the United States Circuit Court of Appeals, Ninth Circuit, commanding said Court and the Clerk thereof to certify to this Court the records and proceedings in this case in said Court styled therein H. L. Mosher, appellant vs. City of Phoenix, a municipal corporation, appellee, together with its opinion therein which became final January, 1932, for the review and determination of said cause by this Court.

The reasons relied on for the issuance of this writ and upon which your petitioner believes that a writ of certiorari ought to issue and which will be more fully stated hereofter, may be summarized as follows:

(1) The Circuit Court of Appeals for the Ninth Circuit in its opinion of affirmance of the judgment of the United States District Court erred in holding that the United States District Court for the District of Arizona did not have jurisdiction of this action which was sought to be invoked on the ground that the action of the

legislative body of the City of Phoenix, the defendant in ordering the improvement of a street (Taylor) in the City of the width and extent of sixty feet, when the same had been dedicated and established to the idth of only forty-eight feet, the remaining twelve feet included in the improvement proceeding, being the private property of the plaintiff, owned in fee title and enclosed under fence, was not a taking of plaintiffs property without due process of law in violation of the Constitution of the United States, for the reasons as held in the opinion that such legislative action proposing to take, pave and improve private property for use as a public street was without the power of the City of Phoenix and was void and no jurisdiction for any action by any person.

(2) The Circuit Court of Appeals for the Ninth Circuit in its opinion of affirmance herein cited as authority for its opinion the opinion of this Court in the case of Memphis vs. Cumberland Tel. and Teleg. Co. 218 U. S. 624, and, as petitioner is advised, contrary to the opinion of this Court in the case of Home Tel. Co. vs. Los Angeles, 227 U. S. 278, and Standard Computing Scale Co. vs. Farrell 249 U. S. 577 and the opinion of the United States Circuit Court of Appeals, Sixth Circuit in the case of City of Louisville vs. Louisville Ry Co. reported in 39 Fed. (2nd) 822, and the District Court for the Eastern District of Kentucky in Kentucky Power and Light Co. vs. Maryville 36 Fed. (2nd) 816.

In this behalf your petitioner states the following as the facts of this cause:

The plaintiff Mosher inherited from her father, S. D. Lount, a tract of land now in the corporate limits of Phoenix. The land in dispute is a portion of that inheritance.

The street ordered improved to the width of sixty (60) feet appears to have been opened and dedicated by its owner (other than Lount) by a map of a subdivision adjacent to Phoenix and made before the city limits was extended to include that property. S. D. Lount, the father and predecessor in title, never by action sold or dedicated this fifty feet at all for any purpose. It passed to his heirs at his death. It has been enclosed under fence for some twenty years by the plaintiff H. L. Mosher. The City of Phoenix makes claim to this fifty foot strip, that will widen the street to one hundred feet by reason of certain deeds between plaintiff and her brother in partition and certain real estate mortgages executed by the plaintiff since satisfied, which the description of the property is described with reference to a map that is of record, made by the city authority, that shows this street to be one hundred feet wide, although such deeds of partition and mortgages does not describe any parcel fronting on this street. Instead of the City authority seeking to quiet its title or to adjudicate its right or to take by condemnation, the legislative authority enacted legislation directing this street to be im-

to a width of sixty feet, which includes the twelve feet owned by the plaintiff Mosher, and which she had enclosed by fence.

In other words, undertook to take this twelve (12) feet to widen the street by force of an improvement resolution and without invoking eminent domain or other legal process.

Plaintiff Mosher sought in the United States Court for the District of Arizona to enjoin such taking.

Plaintiff is a citizen of Arizona and jurisdiction is claimed in the United States Courts solely on the ground that this legislative action and attempt is in violation of the plaintiffs rights under the Constitution of the United States.

Upon objection made the District Court dismissed the petition for relief on the sole ground of lack of jurisdiction, which admits all the material allegations of the bill and this decision was affirmed on appeal.

Your petitioner in brief filed herewith will more particularly elaborate on these questions.

Your petitioner presents herewith a certified copy of the entire record of said cause in the United States Circuit Court of Appeals, Ninth Circuit, including the opinion filed herein and which is sought to be received.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari be issued under the great seal of this Court directed to the United States Circuit Court of Appeals Ninth Circuit sitting in San Francisco, California, commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and of all proceedings in said Circuit Court of Appeals had in said cause, to the end that said cause and the judgment rendered may be reviewed and determined by this Court as provided by law and that the said judgment of the United States Circuit Court of Appeals be reversed by this honorable Court and for such other and for the relief as may seem proper. And your petitioner will ever pray.

JOHN W. RAY,

213 Phoenix National Bank Building,
Phoenix, Arizona,
Counsel for Petitioner.

State of Arizona,
County of Maricopa.

John W. Ray being first duly sworn, on his oath deposes and says that he is counsel for petitioners set out in the caption; that he has read the annexed petition and knows the contents thereof;

that he is also familiar with the certified transcript of the record of the Circuit Court of Appears which accompanies this petition, being the transcript of record in the case at bar; that the matters in said petition are, in the judgment of the affiant, duly supported in and by said transcript of record and that he knows of the proceedings had in this cause and that the facts in said petition herein stated are true to the best of affiant's knowledge and belief.

That affiant is a member of the bar of this court.

JOHN W. RAY.

Subscribed to and sworn to before me by John W. Ray, this day of February, 1932.

J. C. NILES,
Notary Public in and for
Maricopa County, Arizona.

My commission expires

I, John W. Day, an attorney regularly admitted to practice before the Supreme Court of the United States on January 7th, 1907, do certify that I have carefully examined the foregoing petition for a writ of certiorari and know that the allegations thereof are true, in substance and in fact, and in my opinion the petition is well

founded and the case is one in which the prayer of the petitioners should be granted by this court.

JOHN W. RAY,
Counsel for Petitioners.

BRIEF ON PETITION FOR CERTIORARI

May it please the Court:

The petitioner, a citizen of the State of Arizona, comes into the Court of the United States and seeks relief from threatened wrongs. There is no question of diversity of citizenship and jurisdiction is not claimed on that ground.

We do claim the right to invoke the jurisdiction of the United States District Court because of the action of the legislative body of the defendant City in enacting legislation that takes plaintiffs property without compensation. To state it differently, the City has undertaken by the improvement resolution and proceeding, which is within its charter power so far as it relates to public streets, to widen the street and appropriate plaintiff's property without the exercise of the power and proceedure of eminent domain or the payment of compensation. By this improvement resolution and the inclusion of twelve feet of plaintiff's property in the improved area, there is clearly an attempt at confiscation.

To put it another may, and assume there is color of right in the contention of the City that at some time and by some act this twelve feet was dedicated, then we have the case where the City legislative body has undertaken to determine and adjudicate that question in its favor and to be judge, jury and executive officer to divest plaintiff of all right of title and possession by its legislative act, and leave the plainttiff, after her property has been taken and her remaining property not taken charged with the costs of the improvement, to seek redress by way of damages in the local court and maybe against the contractor only as for trespass.

Taken either way the taking is without due process of law and the plaintiff is deprived of her property without compensation or a chance to be heard—without a day in court or even a court.

The District Court held that such action, if taken, amounted to a private trespass and that the District Court could not take jurisdiction any more than if a private person was to break and enter.

The Court of Appeals seems to hold that as the resolution ordering the improvement was absolutely void, if the twelve feet was private property and was valid and within the legislative power and discretion, if this twelve feet was a part of the public street, that no case was presented or could be presentted where the United States Con-

stitution would be violated, so as to sustain jurisdiction. As we see it, if this holding be correct no case could ever be presented in which the District Court could have jurisdiction.

Take the telephone rate case, the street car fare cases, the lighting cases—if the City legislative power can fix or regulate rates then the Court, neither Federal nor State can interfere—has no jurisdiction because the law authorizes that to be done which was done.

If the legislative power does not exist, the legislative attempt is a nullity and confers no power on any one and imposes no penalty if disregarded. But such is not the holding of this Court in the case of Home Tel. Co. vs. Los Angeles, 227 U. S. 278.

In that case the Court said:

> "That is to say, a state officer cannot on the one hand, as a means of doing a wrong forbidden by the amendment, proceed on the assumption of the possession of the State power, and at the same time, for the purpose of avoiding the application of the amendment, deny the power, and thus accomplish the wrong. To repeat: For the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a state officer, in virtue of State power, is doing an act which, if permitted to be done, prima facie

would violate the Amendment, the subject must be tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some State authority."

Nor is it the holding of this court in the case of City of Winchester vs. Winchester Water Co. 251 U. S. 182, wherein it was held that City had no authority to pass or enforce an ordinance fixisg rates for water, and that an attempt was a violation of the Federal Constitution and gave the Court jurisdiction.

In the case of Kentucky Power and Light Co. vs. City of Maysville, 36 Federal (2) 816, the District Court said:

"It is seeking to enjoin the enforcement of an ordinance of the City of Maysville undertaking to fix rates which plaintiff may charge. If third class cities have the power to regulate gas rates within their limits, then the ordinance may be attacked on the ground that it is violative of section 10 of Art. 1, and the Fourteenth Amendment to the Federal Constitution. If the City does not have any such power, its attempt to exercise the power amounts to a taking of plaintiffs property without due process of law; citing City Winchester vs. Winchester Water Co. 251 U. S. 192."

In the case of City of Louisville vs. Louisville Ry Co. 39 Fed. (2) 822, the Circuit Court of Appeals, Sixth Circuit said:

> "The constitutional question frequently presented is whether subsequent legislation impairs the obligation of an earlier contract; or, it may be, as here, whether the complainant is being deprived of its property, without due process of law; but in either event a Federal question is presented where the legislation complaind of is enacted *as an adjunct to one* or another of the several types of delegated sovereign authority. "The fact that the jurisdiction of the Federal Court is so seldom questioned in these cases is in itself persuasive of the existence of jurisdiction. It is only when it affirmatively appears upon the record that the City acted in a purely proprietory capacity and without a delegation of authority from the State, that jurisdiction is held to be lacking—compare Memphis vs. Cumberland Tel. Co. 218 U. S. 642."

The Circuit Court of Appeals, Ninth Circuit in its opinion relies alone on the Memphis case. But that is not the case at bar. The action of the legislative body in ordering the street improved was within a delegated power (Collins vs. City of and the complaint that in the attempt to exercise that delegated power, it did not follow the procedure provided, and that it exceeded its power, in that the plans adopted and the area ordered to be

improved included the property of the plaintiff Mosher, (a direct appropriation and taking by reason of the resolution of improvement) if enforced and acted on, this twelve (12) feet of plaintiff's property, will be taken without any process of law, without condemnation or compensation and without even an adjudication or an opportunity to have adjudicated the question, if there be such, of ownership.

Acting under this resolution—legislative act of the City, its officers, or the contractor under the authority and protection of the resolution, will enter plaintiff's premises, remove her fences and appropriate her land. When we seek preventive relief, we are met with the proposition that the City had no power to so enact and we are left to meet by force the officers of the City who seek to enforce the legislation enacted.

Surely that cannot be the law—surely the City of Phoenix will not be permitted to deny the validity of its own acts to defeat jurisdiction.

It is because of this departure, as we see it, by the Circuit Court of Appeals from the rulings of this Court and its apparent disagreement with the Circuit Court of Appeals, Sixth Circuit, on the question of jurisdiction of the United States District Courts generally as well as its departure from its own holding in the case of Collins vs. City of Phoenix 269 Federal 219, the identical question of law, that we ask this Court to review and reverse its decision herein.

No. 7

Supreme Court

OF THE

United States

OCTOBER TERM, 1931

H. L. MOSHER,

Petitioner,

vs.

CITY OF PHOENIX, ARIZONA,
a Municipal Corporation,

Respondent.

JOHN W. RAY,
For Petitioner

Supreme Court

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Home Tel. Co. vs. City of Los Angeles, 227 U. S. 278.

Kentucky Power & Light Co. vs. Maysville, 36 Fed. (2) 816.

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Memphis vs. Cumberland Tel. Co., 218 U. S. 642.

Petition for CERTIORARI to United States Circuit Court of Appeals, Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, H. L. Mosher, by attorney John W. Ray, respectfully presents this, her petition for a Writ of Certiorari to the United States Circuit Court of Appeals, Ninth Circuit, commanding said Court and the Clerk thereof to certify to this Court the records and proceedings in this case in said Court styled therein H. L. Mosher, appellant vs. City of Phoenix, a municipal corporation, appellee, together with its opinion therein which became final January, 1932, for the review and determination of said cause by this Court.

The reasons relied on for the issuance of this writ and upon which your petitioner believes that a writ of certiorari ought to issue and which will be more fully stated hereofter, may be summarized as follows:

(1) The Circuit Court of Appeals for the Ninth Circuit in its opinion of affirmance of the judgment of the United States District Court erred in holding that the United States District Court for the District of Arizona did not have jurisdiction of this action which was sought to be invoked on the ground that the action of the

legislative body of the City of Phoenix, the defendant in ordering the improvement of a street (Second) in the City of the width and extent of one hundred feet, when the same had been dedicated and established to the width of only fifty feet on the East side, the remaining fifty, on the West side and included in the improvement ordered being the private property of the plaintiff, inherited from her father, who had a deed for that fifty feet and for years enclosed, was not a taking of plaintiff's property without due process of law in violation of the Constitution of the United States, for the reasons as held in the opinion that such legislative action proposing to take, pave and improve private property for use as a public street was without the power of the City of Phoenix and was void and no justification for any action by any person.

(2) The Circuit Court of Appeals for the Ninth Circuit in its opinion of affirmance herein cited as authority for its opinion the opinion of this Court in the case of Memphis vs. Cumberland Tel. and Teleg. Co. 218 U. S. 624, and, as petitioner is advised, contrary to the opinion of this Court in the case of Home Tel. Co. vs. Los Angeles, 227 U. S. 278, and Standard Computing Scale Co. vs. Farrell 249 U. S. 577 and the opinion of the United States Circuit Court of Appeals, Sixth Circuit in the case of City of Louisville vs. Louisville Ry Co. reported in 39 Fed. (2nd) 822, and the District Court for the Eastern District of Kentucky in Kentucky Power and Light Co. vs. Maryville 36 Fed. (2nd) 816.

In this behalf your petitioner states the following as the facts of this cause:

The plaintiff Mosher inherited from her father, S. D. Lount, a tract of land now in the corporate limits of Phoenix. The land in dispute is a portion of that inheritance.

The street ordered improved to the width of forty-eight (48) feet appears to have been opened and dedicated by its owner (other than Lount) by a map of a subdivision adjacent to Phoenix and made before the city limits was extended to include that property. S. D. Lount, the father and predecessor in title, never by action sold or dedicated this twelve feet at all for any purpose. It passed to his heirs at his death. It has been enclosed under fence for some twenty years by the plaintiff H. L. Mosher. The City of Phoenix makes claim to this twelve foot strip, that will widen the street to sixty feet by reason of certain deeds between plaintiff and her brother in partition and certain real estate mortgages executed by the plaintiff, since satisfied, in which the description of the property is described with reference to a map that is of record, made by the city authority, that shows this street to be sixty feet wide, although such deeds of partition and mortgages does not describe any parcel fronting on this street. Instead of the City authority seeking to quiet its title or to adjudicate its right or to take by condemnation, the legislative authority enacted legislation directing this street to be improved

to a width of one hundred feet, which includes the fifty feet owned by the plaintiff Mosher, and which she had enclosed by fence.

In other words, undertook to take this fifty (50) feet to widen the street by force of an improvement resolution and without invoking eminent domain or other legal process.

Plaintiff Mosher sought in the United States Court for the District of Arizona to enjoin such taking.

Plaintiff is a citizen of Arizona and jurisdiction is claimed in the United States Courts solely on the ground that this legislative action and attempt is in violation of the plaintiffs rights under the Constitution of the United States.

Upon objection made the District Court dismissed the petition for relief on the sole ground of lack of jurisdiction, which admits all the material allegations of the bill and this decision was affirmed on appeal.

Your petitioner in brief filed herewith will more particularly elaborate on these questions.

Your petitioner presents herewith a certified copy of the entire record of said cause in the United States Circuit Court of Appeals, Ninth Circuit, including the opinion filed herein and which is sought to be received.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari be issued under the great seal of this Court directed to the United States Circuit Court of Appeals Ninth Circuit sitting in San Francisco, California, commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and of all proceedings in said Circuit Court of Appeals had in said cause, to the end that said cause and the judgment rendered may be reviewed and determined by this Court as provided by law and that the said judgment of the United States Circuit Court of Appeals be reversed by this honorable Court and for such other and for the relief as may seem proper. And your petitioner will ever pray.

JOHN W. RAY,

213 Phoenix National Bank Building,
Phoenix, Arizona,
Counsel for Petitioner.

State of Arizona,
County of Maricopa.

John W. Ray being first duly sworn, on his oath deposes and says that he is counsel for petitioners set out in the caption; that he has read the annexed petition and knows the contents thereof;

that he is also familiar with the certified transcript of the record of the Circuit Court of Appears which accompanies this petition, being the transcript of record in the case at bar; that the matters in said petition are, in the judgment of the affiant, duly supported in and by said transcript of record and that he knows of the proceedings had in this cause and that the facts in said petition herein stated are true to the best of affiant's knowledge and belief.

That affiant is a member of the bar of this court.

JOHN W. RAY.

Subscribed to and sworn to before me by John W. Ray, this day of February, 1932.

J. C. NILES,
Notary Public in and for
Maricopa County, Arizona.

My commission expires

I, John W. Day, an attorney regularly admitted to practice before the Supreme Court of the United States on January 7th, 1907, do certify that I have carefully examined the foregoing petition for a writ of certiorari and know that the allegations thereof are true, in substance and in fact, and in my opinion the petition is well

founded and the case is one in which the prayer of the petitioners should be granted by this court.

JOHN W. RAY,
Counsel for Petitioners.

BRIEF ON PETITION FOR CERTIORARI

May it please the Court:

The petitioner, a citizen of the State of Arizona, comes into the Court of the United States and seeks relief from threatened wrongs. There is no question of diversity of citizenship and jurisdiction is not claimed on that ground.

We do claim the right to invoke the jurisdiction of the United States District Court because of the action of the legislative body of the defendant City in enacting legislation that takes plaintiffs property without compensation. To state it differently, the City has undertaken by the improvement resolution and proceeding, which is within its charter power so far as it relates to public streets, to widen the street and appropriate plaintiff's property without the exercise of the power and proceedure of eminent domain or the payment of compensation. By this improvement resolution and the inclusion of twelve feet of plaintiff's property in the improved area, there is clearly an attempt at confiscation.

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The Circuit Court of Appeals, Ninth Circuit in its opinion relies alone on the Memphis case. But that is not the case at bar. The action of the legislative body in ordering the street improved was within a delegated power (Collins vs. City of and the complaint that in the attempt to exercise that delegated power, it did not follow the procedure provided, and that it exceeded its power, in that the plans adopted and the area ordered to be

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Acting under this resolution—legislative act of the City, its officers, or the contractor under the authority and protection of the resolution, will enter plaintiff's premises, remove her fences and appropriate her land. When we seek preventive relief, we are met with the proposition that the City had no power to so enact and we are left to meet by force the officers of the City who seek to enforce the legislation enacted.

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It is because of this departure, as we see it, by the Circuit Court of Appeals from the rulings of this Court and its apparent disagreement with the Circuit Court of Appeals, Sixth Circuit, on the question of jurisdiction of the United States District Courts generally as well as its departure from its own holding in the case of Collins vs. City of Phoenix 269 Federal 219, the identical question of law, that we ask this Court to review and reverse its decision herein.

FILE COPY

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CHARLES

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1932

No. 6 and 7

H. L. MOSHER,

Petitioner

vs.

CITY OF PHOENIX,

Respondent

BRIEF FOR PETITIONER

Upon Certiorari to United States Circuit Court of Appeals, Ninth Circuit

---

JOHN W. RAY,
Attorney, Phoenix, Arizona

Pryer Co., Printers

QUESTION AND CASES CITED

The jurisdiction of the United States District Court to enjoin enforcement of a paving resolution, that includes as a part of a street to be paved, lands claimed by a resident citizen of the City, exists upon the claim that the enforcement of such resolution will result in the taking of plaintiff's property for public purposes without compensation and without due process of law in derogation of plaintiff's rights under the Constitution of the United States.

CASES CITED

Collins vs. City Phoenix, 269 Fed. 219.

Cuyahoga River Power Co. vs. City Akron 240 U. S. 462.

Great Northern Ry. vs. Minnesota, 238 U. S. 340.

Grand Trunk Ry. Co. vs. Railroad Com. 221 U. S. 400.

Harvard Law Review Vol. 40 p. 969 el seq.

Home Telephone Co. vs. Los Angeles 227 U. S. 278.

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La. Pub. Utility vs. Morgan 264 U. S. 393.

Louisville vs. Louisville Ry. Co. 39 Fed. (2) 822.

Lake Erie and W. Ry. vs. State Public Utility, 249 U. S. 424.

Oregon Ry. and N. Co. vs. Fairchild 224 U. S. 510.

Standard Computing Scale vs. Ferrell, 249 U. S. 577.

ON QUESTION OF GENERAL EQUITY JURISDICTION

Gulf Lines Ry. vs. Golconda Ry. 290 Ill. 384.

Osborne vs. Mo. Pac. Ry. 147 U. S. 248.

Pontiac Imp. Co. vs. Cleveland Park Board. 104 Ohio St. 447.

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On Certiorari to the United States Circuit Court of Appeals, for the Ninth Circuit.

BRIEF FOR PETITIONER

May It Please the Court:

The order granting certiorari limits the question herein to one only, that is, the jurisdiction of the District Court of the United States sitting in Equity.

There is no diversity of citizenship and no Federal statute involved.

We base our contention of jurisdiction solely on the contention that the action of the legislative body of the City of Phoenix, called City Commission in enacting and passing certain resolutions which provide for the paving a street, the cost of

which to be assessed against the property within a designated district, if enforced would deprive plaintiff of her property without due process of law contrary to the fourteenth amendment of the Federal Constitution.

In these resolutions so enacted the street is named and the improvement thereof ordered within certain named termini and then reference is made to a plat and plan on file in the City Engineer's office for details of the proposed improvement, as to material, depth of pavement and width to be paved.

It is that latter dimension (width) shown on the plat and plan that brings on the dispute.

Originally, that is before the city limits extended so as to embrace petitioner's land, a plat was made of some 120 acres adjacent to Phoenix, and this was called Churchill's Addition to Phoenix. This plat showed streets and lots, but it was never signed nor acknowledged under the statutory requirement for such purposes, nor did the makers and promoters of such addition or subdivision ever at any time own the land claimed by the plaintiff Mosher.

The land here in dispute as well as adjoining lands was, at the time of this platting, owned by plaintiff's father, Samuel D. Lount, who did not plat, or dedicate anything.

The makers of the plat of Churchill Addition (second one) did own land to the North and East of the Lount tract and so in the platting, laid off as a street, Taylor Street, and of that the platters owned 48 feet and the land on North, while S. D.

Lount owned the land South of this 48 feet, and on Second Street (which runs North and South) the platters owned Eastward and Lount owned Westward and the platters laid off of their holdings for Second Street, fifty feet in width, while North of Lount's line they platted Second Street one hundred feet in width.

It is manifest from the plat which was filed that it was expected that Mr. Lount would give or dedicate a portion of this land to make Taylor Street eighty feet wide and would likewise dedicate land on the West side to make Second Street one hundred feet wide, but such was never done by any owner of the Lount tract.

By these resolutions providing for the paving of Taylor and another for Second Street, the plats and plans adopted and made part of the resolutions, shows Taylor Street is to be paved sixty feet in width and Second Street one hundred feet in width, thus providing for paving as a public street twelve feet of plaintiff's land South of the 48 feet dedicated as Taylor Street and of fifty feet of plaintiff's land West of the 50 feet dedicated as Second Street by the owners, who platted Churchill Addition.

The twelve feet South of Taylor Street was then in plaintiff's possession and had been under fence for about 24 years. The fifty feet West of Second Street was mostly open as the lots were not fenced.

The plaintiff's contention is that the enactment of the resolutions providing for the improvement of streets (48 feet of Taylor and 50 feet of Second)

is clearly within the powers of the city legislative body.

As to whether in the enactment of the resolutions the procedure was strictly followed, we need not discuss, as the City, when sued, cannot plead and rely on its failure, if it did fail, to follow the correct procedure.

The power is clearly given to the legislative body of Phoenix to enact legislation providing that its streets be improved.

This legislative action by the City is the legislative power of the State extended and if it violates plaintiff's rights under the Federal Constitution, can be questioned in the Courts of the United States.

Standard Computing Scale vs. Farrell, 249 U. S. 577.

Great Northern Ry. vs. Minnesota, 238 U. S. 340.

Home Tel. Co. vs. Los Angeles, 227 U. S. 278.

Oregon Ry. and N. Co. vs. Fairchild, 224 U. S. 510.

Grand Trunk Ry. Co. vs. R. R. Commission, 221 U. S. 400.

Lake Erie and W. Ry. vs. State Pub. Utilities Co., 249 U. S. 424.

Cuyohoga R. Power Co. vs. City Akron, 240 U. S. 462.

The question then becomes more pointed when it is alleged that under this legislative action, that is whether the power of the City to enact, in so far as the proposed improvement is of a legal street, property is included in the plats and plans adopted to be improved, that is not a part of the public streets, is such a resolution the exercise of state legislative power.

Can the City legislative body in the exercise of its legislative power include property over which it has no control and cannot order improved, when its powers as to such excess is questioned, be heard to say that its powers have been exceeded and thus and thereby prevent the United States District Court from exercising jurisdiction to protect the owner's rights under the Constitution of the United States, when if such power was not questioned in the courts, the owner's property would under the legislative power assumed, be taken and converted to public use without compensation.

In the recent case of Kentucky Power and Light Co. vs. Maysville, 26 Fed. (2) 816, this identical question was presented on a motion of dismiss, although the question there was as to rate regulation. The Court said:

> "If the State has conferred that power (rate making) upon cities of the third class, then the ordinance of April 1929, complained of in this case, is an act of the State and may be attacked in the Federal Court as violative of the Federal Constitutional guaranties. If the City has not been granted such power by the State, it cannot be heard in a proceeding such as this, to question the existence of the

> power. It cannot attempt to exercise a power which it could legally exercise only if authorized so to do by the State, and then, when its action is attacked as violative of the Federal Constitutional provision assert that its act in passing the ordinance was without State authority and therefore not the act of the State. Home Tel. Co. vs. Los Angeles 227 U. S. 278. In later case in the Circuit Court of Appeals,

Sixth Circuit, a rate making case, City of Louisville vs. Louisville Ry. Co., 39 Fed. (2) 822, The Court said:

> Briefly stated, the contention of the appellant is that the power of rate regulation has never been delegated by the Commonwealth to the general council of the City. . . . and that the alleged confiscatory rates were therefore not the result of *State action*, but solely of action by a municipality in a proprietory capacity, which would not create Federal jurisdiction under the fourteenth amendment. . . . . It thus becomes unnecessary to decide the strongly-urged question of the application of the doctrine of Home Tel. Co. vs. Los Angeles 227 U. S. 278, that "where a State officer under an assertion of power from the State is doing an act which could only be done upon the predicate that there was such power, the inquiry as to the repugnancy of the act to the fourteenth amendment cannot be avoided by insisting that there is a want of power." Doubtless the general council and officers of the City believe the power of rate regulation to have been delegated to the City, and acted upon this belief, but that action might

> also have been predicated upon the power reserved in the franchise and not solely upon the delegation of the power or rate control, perse. Upon either view, as we have seen, a Federal question is presented."

The court will notice that in neither of these two cases were there diversity of citizenship. Jurisdiction rested solely on the question of municipal legislative action, as depriving a local corporation of its property without due process of law.

If there be a difference or a distinction, our idea is that the instant case presents the stronger in favor of the exercise of jurisdiction.

In the rate cases there might be a question of taking property, here there is no doubt as to the taking.

We recognize the force of the argument in the opinion of the Circuit Court of Appeals that the City legislative body had no power or authority to order private property improved, no power to take private property for public use without compensation and so that court held that as the power granted the City legislative body had been exceeded, its action was void, and if void was not the action of the State legislative power.

If that be the true doctrine, when would the United States District Courts have jurisdiction.

If we allege that the legislative act is with full power to do, the taking would be according to due process of law.

If we allege the action to be without the delegated legislative power and therefore wrong and void and a taking under such wrongful and unauthorized act not due process of law, we are met with the answer, such action is unauthorized and void and on the authority of Memphis vs. Cumberland Tel. Co. 218 U. S., 624, was not State authority and so no jurisdiction.

If the reasoning of the Circuit Court of Appeals be correct, then there is no case where the U. S. District Court would have jurisdiction in the absence of diverse citizenship.

Even here, the resolution is within the power to enact, that is the subject matter. It may have followed regular course of procedure and if the plat and plans had confined the improvement to the legally established and recognized street might have been valid in every respect; or if this resolution had been in contemplation of some other action and proceeding to acquire by lawful methods this additional land to widen the street, it might have been valid in every respect; but when we look to the plat and plans adopted, we find that there is included in the proposed improvement private property of the plaintiff and in excess of, and an abuse of the power of the legislative body, there is a taking, if enforced, of private property without due process of law, violative of plaintiff's rights under the fourteenth amendment.

It is this abuse of the power by the City legislative body in including in an improvement resolution, that is within its power to enact, the provision to improve this extra land of the plaintiff, that the

City does not own and for which no compensation is provided or proposed to be paid that we complain. It was said in the case of Home Tel. Co. vs. Los Angeles 227 U. S. 278:

> "The settled construction of the amendment is that it pre-supposes the possibility of an abuse by a State officer or representative, of the powers possessed and deals with such a contingency. It provides therefore for a case where one who is in possession of State power uses that power to the doing of the wrongs which the amendment forbids, even although the consummation of the wrong itself is rendered possible or is efficiently aided by the State authority lodged in the wrong doer. That is to say, the theory of the amendment is that, where an officer or other representative of a State, in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power. To speak broadly, the difference between the position insisted upon and the true meaning of the amendment is this, that the one assumes that the amendment virtually contemplates alone wrongs authorized by a State and gives only power accordingly, *while in truth the amendment contemplates the possibility of State officers abusing the powers lawfully conferred upon them by doing wrongs prohibited by the amendment.* (Italics ours).

Again in La. Pub. Utilities Co. vs. Morgan 264 U. S. 393, the Court said:

> "By an original bill filed in the court below appellee challenged the validity of the order because beyond the power of the Commission, and if within such power, enforcement would deprive the company of property, without due process of law and impair the obligation of its contract with the City of New Orleans, contrary to the Federal Constitution.
>
> "The allegations are sufficient to bring the controversy within the court's jurisdiction and empower it to determine questions of both State and Federal law."

Having once established that action by a City legislative body within the scope of its delegated authority is the legislative power of the State, the court has jurisdiction to enjoin an excessive use of that power or an abuse of that power to the same extent as if the act complained of was that of the State legislative body itself.

If it is valid it will not be enjoined, for the United States District Court has no power—no jurisdiction to enjoin rightful, legal action of the State through its legislative body. Such act if authorized and legal would not infringe a right protected by the Constitution of the United States.

If the State legislative action be without the power of that body or in excess or an abuse of the power it would be void and would be enjoined, if its enforcement, or if action under it, would take any

persons property. Any such taking would be without due process of law.

This, as we understand the authorities, the numerous cases decided by this court—is the application of the prohibition of the fourteenth amendment.

If legal and authorized, action thereunder will not be enjoined.

If illegal and unauthorized, or in excess or an abuse of power and it will deprive a person of his property, it will be enjoined.

Perhaps there should be added, if the legislative action be within the general or apparent scope of the delegated power. Or as the Circuit Court of Appeals, sixth circuit, puts it:

> "Doubtless the general council and officers of the City believe the power of rate regulation to have been delegated to the City and acts upon this belief. . . . . upon either view, as we have seen, a Federal question is presented."

The case of City of Winchester vs. Winchester Waterworks Co. 251 U. S. 192, was an action to enjoin the enforcement of an ordinance of the City fixing water rates.

There was no diversity of citizenship. Jurisdiction was invoked on Constitutional grounds and therefore appeal was direct to the Supreme Court. Jurisdiction was necessarily involved and could not be overlooked.

The Court stated the case thus:

> "By the bill and amended bill it was charged that the City had no authority to pass or enforce an ordinance fixing rates because (1) no power had been granted to the City so to do by the Legislature of Kentucky; (2) Because the rates established were so low as to be confiscatory and consequently the ordinance was violative of rights secured to the company by the fourteenth amendment. . . . . The bill invoked jurisdiction upon a Constitutional ground and the case was brought here by direct appeal."

Examining the law the court held that the City legislative body had no power or authority to pass or enforce an ordinance fixing rates. Affirming the decree below, and of necessity, holding that the United States District Court had jurisdiction although it was decided that the City legislative action was void as without power.

The Circuit Court of Appeals in this case held no jurisdiction because the legislative action was void as without power to enact.

In the case of Julia Mosher Collins, W. B. Lount and this plaintiff vs. City of Phoenix, reported in 269 Federal Reporter 219 there was presented the question of the enactment and enforcement of a paving ordinance of the City of Phoenix that covered Van Buren Street and as the plaintiffs charged a strip of this land that was no part of Van Buren Street. As we see it, the identical question herein presented. This same plaintiff with others, the same defendant exercising the same legislative power as to a different street in the City.

The District Court took jurisdiction, decided the case adverse to the plaintiffs claim of private ownership, holding the strip in controversy had been dedicated by predecessors in title. On appeal the Circuit Court of Appeals, ninth circuit, affirmed that decree.

Now, by the decree of dismissal here, for want of jurisdiction, that judgment would be null and void. The Circuit Court of Appeals did not comment on that situation although its attention was directed to it.

But the identical question here presented seems to have been decided in the case of Cuyahoga River Power Co. vs. City of Akron, 240 U. S. 462.

The plaintiff Power Company claimed certain water rights in the river to use the impounded water; the City by ordinances undertook to take or destroy that claimed right by building a dam.

The suit was dismissed in the District Court for want of jurisdiction. There was no diverse citizenship.

In reversing and holding jurisdiction, this court, Justice Holmes said:

> "After setting out various passages from the statutes and Constitution of Ohio, and concluding that the City has no Constitutional power to take the property and franchise that the plaintiff is alleged to own, or any property for a water supply, it alleges that the City does not intend to institute any proceedings against

plaintiff, but intends to take its property without compensation; that it is building a dam and has taken steps that will destroy the plaintiffs rights; that it is insolvent; that the purposes of the ordinance and certain statutes referred to is to appropriate and destroy those rights without compensation; that defendant purports to be acting under the ordinance and that in so acting it violates Art. 1, Section 10, and the fourteenth amendment of the Constitution of the United States. It is established that such action is to be regarded as the action of the State. Raymond vs. Chicago Union Tr. Co. 207 U. S. 20. Home Tel. and Tel. Co. vs. Los Angeles 227 U. S. 278.

Whether the plaintiff has any rights that the City is bound to respect can be decided only by taking jurisdiction of the case, and the same is true of the other question raised. Therefore it will be necessary for the District Court to deal with the merits."

An examination of the cases shows that the Circuit Court of Appeals in the sixth circuit and the ninth circuit are not in accord. The ninth circuit has tended to dismiss and deny jurisdiction, while the sixth circuit has upheld jurisdiction.

The case of Home Tel. & Tel. Co. vs. Los Angeles, 227 U. S. 278, came from the ninth circuit but a District Court, and was reversed and as we understand it materially modified, if it did not overrule the Barney case, and the case of Memphis vs. Cumberland Tel. Co. 218 U. S. 624, cited in the opinion of the Circuit Court of Appeals.

On this subject there is an exhaustive article in Harvard Law Review, Vol. 40, page 969, by Samuel Shepp Isseks, that reviews all the cases, both of this court and the lower courts up to its date, 1927, and which reaches the conclusion supporting our contention of jurisdiction. Were it more condensed, we would copy it here. We cite that article as conclusive.

We take it from order granting the writs of cetriorari that jurisdiction in equity is not in question but if it were the cases of Osborne vs. Mo. Pac. Ry. 147 U. S. 248; Gulf Lines Ry. Co. vs. Galconda Ry. Co. 290, Ill. 384; Pontiac Imp. Co. vs. Cleveland Park Board, 104 Ohio St. 447 is conclusive.

A reversal is respectfully asked.

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